regardless of whether the Commission has found that CLECs are impaired without UNE access to such elements. In the *Triennial Review Order*, the Commission rejected claims that "states may impose any unbundling framework they deem proper under state law, without regard to the federal regime." *Id.* ¶ 193; *see also id.* ¶¶ 193 n.614, 194. Instead, the Commission found that, if a state commission "were to require the unbundling of a network element for which the Commission has either found no impairment . . . or otherwise declined to require unbundling on a national basis," it would be "unlikely that such [a] decision would fail to conflict with and 'substantially prevent' implementation of the federal regime." *Id.* ¶ 195. Although the D.C. Circuit dismissed challenges to the Commission's determinations in this regard as unripe, the court did not call into question the Commission's reasoning — on the contrary, in questioning counsel for NARUC, the judges strongly suggested that the Commission had correctly found that such state decisions are preempted.[122]

In this proceeding, the Commission should make certain that there is no doubt that, unless this Commission finds impairment under § 251(d)(2), state commissions can impose *no* obligation on incumbents to provide access to an unbundled network element. In particular, the Commission should reaffirm that state commission decisions imposing UNE obligations where this Commission has not are preempted. The Commission, moreover, should make clear that it stands ready, on an expedited basis, to issue rulings preempting any such state commission decisions. Finally, the Commission should reaffirm that § 271 does *not* require BOCs to provide

[122] *See USTA II*, 359 F.3d at 594; Transcript of Oral Argument at 84, *USTA II*, Nos. 00-1012, *et al.* (D.C. Cir. Jan. 28, 2004) ("Do you really want us to decide th[e] question [of preemption of state unbundling rules] now? Sometimes it's not good, you may not like what you're asking for.").

UNEs at TELRIC rates and that state commissions have no authority to regulate BOCs' provision of those "271 elements."

A. State Commissions Have No Authority Under Federal or State Law To Impose UNE Obligations Where This Commission Has Not Found Impairment

The role of state commissions in implementing the 1996 Act is "carefully delineate[d]" and does not, as the D.C. Circuit has found, include imposing UNE requirements where the Commission has not made a finding that CLECs would be impaired without UNE access to a particular network element. *USTA II*, 359 F.3d at 568; *see Triennial Review Order* ¶ 195. Indeed, there can no longer be any serious dispute that Congress intended for the Commission to determine which network elements must be unbundled, and which elements need not be, because requiring those elements to be provided as UNEs would be inconsistent with the 1996 Act. In 1999, the Supreme Court expressly held that § 251(d)(2) "requires *the Commission* to determine on a rational basis *which* network elements must be made available, taking into account the objectives of the Act." *Iowa Utils. Bd.*, 525 U.S. at 391-92 (first emphasis added).[123] Consistent with the Supreme Court's determination, the D.C. Circuit "vacate[d], as an unlawful subdelegation of *the Commission's § 251(d)(2) responsibilities*, those portions of the Order that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements." *USTA II*, 359 F.3d at 568 (emphasis added). The court also noted that the Commission had "acknowledge[d] that § 251(d)(2) instructs 'the Commission' to 'determine[]' which network elements shall be made available to CLECs on an unbundled

[123] *See also Iowa Utils. Bd.*, 525 U.S. at 378 n.6, 385 n.10 (recognizing Congress's choice to create a "*federal* regime . . . guided by federal-agency regulations," except in those "few specified areas" where Congress deliberately "left the policy implications of that [regime] to be determined by state commissions," which do not include unbundling under § 251(c)(3)).

basis." *Id.* at 565. These decisions make clear that Congress entrusted the Commission — and the Commission alone — with the responsibility and the duty to determine which network elements must be unbundled and in which markets.

For related reasons, state commissions have no authority to impose UNE obligations under state law where the Commission has not found impairment. As shown above, the 1996 Act establishes, as an affirmative requirement of federal law, that there be a valid finding of impairment *before* an incumbent is required to provide any network element as a UNE. In the absence of any such finding — a finding that only the FCC is empowered to make — imposition of any UNE requirement is inconsistent with federal law and is not permitted. Indeed, all of the provisions of the 1996 Act that preserve state commission authority make clear that state commissions have no retained authority to take actions that conflict with the requirements of the 1996 Act or the Commission's regulations, or that substantially prevent the implementation of the Act and those rules. *See Triennial Review Order* ¶¶ 192, 194. And, as noted above, the Commission has already ruled that, where "the Commission has either found no impairment . . . or otherwise declined to require unbundling on a national basis," states are barred from adopting any unbundling requirement because it would be "unlikely that such decision would fail to conflict with . . . implementation of the federal regime." *Id.* ¶ 195. The Seventh Circuit, discussing a state commission's authority to require unbundling, similarly "observe[d] that only in very limited circumstances, *which we cannot now imagine*, will a state be able to craft a[n] . . . unbundling requirement that will comply with the Act." *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004) (emphasis added).

For these reasons, some state commissions have already recognized that "no unbundling can be ordered in the absence of a valid finding *by the FCC* of impairment under 47 U.S.C.

§ 251(d)(2)."[124] These commissions have acknowledged that, where the Commission has not found impairment, "[s]tate mandated unbundling . . . would not be 'merely' inconsistent with the federal rules in their current form, but would be contrary to them."[125] Other state commissions, however, have asserted authority to require incumbents to continue providing UNEs at TELRIC rates — even in the face of a judicially affirmed finding of no impairment by the Commission. Thus, the Pennsylvania commission has held that Verizon must continue providing circuit switching for enterprise customers and line sharing at TELRIC rates.[126] The Maine commission likewise ordered Verizon to continue providing at TELRIC rates enterprise switching and other network elements for which the Commission found no impairment.[127] The New Jersey and Maryland commissions have also ordered Verizon to continue providing UNE circuit switching

[124] Order Dismissing Petitions, *Petition of Competitive Carrier Coalition for an Expedited Order that Verizon Virginia Inc. and Verizon South Inc. Remain Required To Provision Unbundled Network Elements on Existing Rates and Terms Pending the Effective Date of Amendments to the Parties' Interconnection Agreements; Petition of AT&T Communications of Virginia, LLC, and TCG Virginia, Inc. for an Order Preserving Local Exchange Market Stability*, Case Nos. PUC-2004-00073 & PUC 2004-00074, at 6 (Va. SCC July 19, 2004) (emphasis added).

[125] Order Dismissing Remaining Issues, *Investigation by the Department on its Own Motion as to the Propriety of Rates and Charges Set Forth in M.D.T.E. No. 17, Filed with the Department by Verizon New England, Inc. d/b/a Verizon Massachusetts on May 5 and June 14, 2000, To Become Effective October 2, 2000*, D.T.E. 98-57, at 15 (Mass. DTE Jan. 30, 2004); *see id.* at 16-17.

[126] *See* Reconsideration Order, *Investigation into the Obligations of Incumbent Local Exchange Carriers To Unbundle Local Circuit Switching for the Enterprise Market*, Docket No. I-00030100, at 12, 17 (Pa. PUC May 27, 2004); *see also* Opinion and Order, *Covad Communications Co. v. Verizon Pennsylvania Inc.*, Docket No. R-00038871C001, at 16, 20 (Pa. PUC July 8, 2004).

[127] *See* Order – Part II, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, at 19-20 (Me. PUC Sept. 3, 2004).

subject to the four-line carve-out.[128] The California commission has ordered Verizon to unbundle packet switches, even though this Commission has consistently rejected any such unbundling requirement.[129] These decisions — and others just like them[130] — are contrary to this Commission's determinations and, therefore, are preempted by federal law.

In issuing its ruling on remand from the D.C. Circuit, the Commission should reaffirm that state commissions *cannot* require incumbents to provide UNEs where this Commission has not imposed any such requirement. And the Commission should establish a procedure that ensures the prompt preemption of any state commission order — whether issued in the past or the future — that purports to impose such an obligation. Specifically, the Commission should rule on complaints that a state commission has imposed an unbundling requirement that is preempted by the Commission's determinations within the same 90-day period that applies to complaints that a BOC is not in compliance with § 271. The Commission, moreover, should

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[128] *See, e.g.*, Letter from Donald P. Eveleth, Assistant Executive Secretary, Maryland Public Service Commission, to Mark A. Keffer, AT&T Communications of Maryland, Inc., and David A. Hill, Verizon Maryland Inc. (Aug. 20, 2004) (requiring Verizon to continue providing UNE switching to business customers subject to the Four-Line Carve-Out rule); Order on Motion for Clarification, *Implementation of the Federal Communications Commission's Triennial Review Order*, Docket No. TO03090705, at 9-11 (N.J. BPU Aug. 19, 2004) (same).

[129] *See* Interim Order Confirming the Assigned Commissioner and Administrative Law Judge Ruling Granting Emergency Motion for an Order Maintaining the Status Quo, *AT&T Communications of California, Inc., et al. v. Verizon California Inc.*, Case 04-08-026, Decision 04-09-056, at 3, 6-8 (Cal. PUC filed Aug. 19, 2004) (requiring Verizon to unbundle local switching and common transport provided out of packet switches).

[130] *See, e.g.*, Order Entry, *Indiana Utility Regulatory Commission's Investigation of Matters Related to the Federal Communications Commission's Report and Order and Order on Remand and Further Notice of Proposed Rulemaking in CC Docket Nos. 01-338, 96-98, and 98-147*, Cause Nos. 42500, 42500-S1 & 42500-S2 (Ind. URC June 14, 2004) (ordering ILECs to continue providing all UNEs at TELRIC rates); Opinion and Order, *Request for Declaratory Ruling, or in the Alternative, Complaint of CompTel/Ascent Alliance, et al., for an Order Requiring Compliance with the Terms and Cnditions of Interconnection Agreements*, Case No. U-14139 (Mich. PSC June 3, 2004) (same).

place on state commissions (and their supporting CLECs) the burden of proving that a state commission-imposed unbundling obligation is consistent with federal law and does not substantially prevent implementation of the Act and the Commission's implementing regulations.

B. State Commissions Have No Authority Under Federal or State Law To Regulate 271 Elements

1. Section 271 requires BOCs, such as Verizon, to demonstrate that they provide access to certain network elements — "loop[s]," "transport," "switching," and "databases and associated signaling" — in order to obtain authority to provide in-region long-distance services. 47 U.S.C. § 271(c)(2)(B)(iv)-(vi), (x). The Commission also has construed § 271 to impose an independent and continuing obligation on BOCs to provide access to these elements, even when they do not have to be unbundled under the standard set forth in § 251(d)(2). This obligation, however, is entirely one of federal law and is within the exclusive jurisdiction of the Commission to interpret and enforce, and the Commission should confirm that state commissions have no authority to regulate 271 elements.[131] Indeed, as the Commission and courts have recognized, Congress granted "*sole authority* to the Commission to administer . . . section 271" and intended that the Commission exercise "*exclusive authority* . . . over the section 271 process." *InterLATA Boundary Order*[132] ¶¶ 17-18 (emphases added); *see also SBC Communications Inc. v. FCC*, 138

[131] *See, e.g.*, Comments of Verizon, WC Docket No. 04-245 (FCC filed July 30, 2004); Reply Comments of Verizon, WC Docket No. 04-245 (FCC filed Aug. 16, 2004).

[132] Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration Or Clarification of Declaratory Ruling Regarding U S West Petitions To Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392 (1999) ("*InterLATA Boundary Order*").

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F.3d 410, 416-17 (D.C. Cir. 1998) ("Congress has clearly charged the FCC, and not the State commissions," with determining whether a BOC has complied with conditions in § 271).[133]

The terms of § 271 make this conferral of authority on the Commission explicit. Thus, "*the Commission shall* . . . approv[e] or deny[]" an application for long-distance authority; "*[t]he Commission shall* establish procedures for the review of complaints" that a BOC is not complying with § 271; "*the Commission shall* act on such [a] complaint within 90 days"; and "*the Commission may*" take action to enforce the requirements of § 271 if "*the Commission determines*" that a BOC is not complying with that section. 47 U.S.C. § 271(d)(3), (6) (emphases added). And Congress again spoke to the Commission's authority to implement § 271 when it precluded "*[t]he Commission*" from acting, "by rule or otherwise, [to] limit or extend" the conditions set forth in the "competitive checklist." *Id.* § 271(d)(4) (emphasis added).

In contrast, the only role Congress identified for state commissions is derivative of a task Congress assigned to the Commission. Thus, § 271(d)(2)(B) provides that, with respect to an "application" for long-distance approval, "the *Commission shall* consult with the State commission of [that] State" so that the Commission (not the state commission) can "verify the compliance of the Bell operating company with the requirements of [section 271(c)]." *Id.* § 271(d)(2)(B) (emphasis added). Congress also gave state commissions no role *after* approval of such an application, and the Commission has never held that it has the obligation to consult with a state commission before ruling on a complaint under § 271(d)(6). State commissions

[133] Indeed, state commissions have *never* had authority over the conditions for BOC entry into the interLATA market. That authority was initially exercised by the federal courts and Congress then transferred that authority to the Commission. *See* Order, *Petition for Declaratory Ruling Regarding U S West Petitions To Consolidate LATAs in Minnesota and Arizona*, 12 FCC Rcd 4738, ¶¶ 17-19 (Chief, Comm. Car. Bur. 1997) (citing 1996 Act, § 601(a)(1) and 47 U.S.C. § 251(g)), *aff'd*, *InterLATA Boundary Order* ¶¶ 14-20.

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therefore have no authority to "parlay [their] limited role in issuing a recommendation under section 271 . . . into an opportunity to issue an order" — whether under federal law or "ostensibly under state law" — "dictating conditions on the provision" of 271 elements. *Indiana Bell*, 359 F.3d at 497. Such efforts are preempted because they "bump[] up against" the procedures that are "spelled out in some detail in sections 251 and 252" and "interfere[] with the method the Act sets out" in § 271. *Id.*

The detailed procedures in § 251 and § 252, moreover, confirm that state commissions have no authority to regulate 271 elements. To the extent those sections impose obligations on incumbents or grant authority to state commissions, they are expressly tied to network elements that must be provided as UNEs under § 251. Thus, state commission authority over interconnection agreements is triggered by "a request . . . *pursuant to section 251*," and where "negotiation[s] *under this section*" are unsuccessful either party "may petition a State commission to arbitrate any open issues." 47 U.S.C. § 252(a)(1), (b)(1) (emphases added); *see also id.* § 252(c)(1) (state commission must resolve open issues consistent with "the requirements of section 251"); *id.* § 252(e)(2)(B) (state commission may reject arbitrated agreement that "does not meet the requirements of section 251"). Furthermore, § 251(c)(1) obligates incumbents to negotiate — and, if necessary, arbitrate pursuant to § 252 — only "terms and conditions of agreements to fulfill the duties described in [section 251(b) and (c)]." *Id.* § 251(c)(1). Based on these provisions, the Commission has held that "*only* those agreements that contain an ongoing obligation *relating to section 251(b) or (c)*" are "interconnection agreement[s]" covered by § 252. *Qwest Declaratory Ruling*[134] ¶ 8 & n.26 (emphases added).

[134] Memorandum Opinion and Order, *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty To File and Obtain Prior Approval of*

With respect to state commissions' authority to set rates, § 252(d)(1) is similarly "quite specific" and "*only* applies for the purposes of implementation of section 251(c)(3)." *Triennial Review Order* ¶ 657 (emphasis added). The Commission's conclusion is compelled by the text of § 252, which authorizes state commissions, in arbitrating interconnection agreements, to establish rates only for "network elements according to [section 252(d)]," which in turn authorizes "[d]eterminations by a State commission" of the "rate for network elements *for purposes of* [*section 251(c)(3)*]." 47 U.S.C. § 252(c)(2), (d)(1) (emphasis added). Congress made no comparable delegation of rate-setting authority to state commissions with respect to 271 elements, and there is "*no serious argument*" that the UNE pricing regime "appl[ies] to unbundling pursuant to § 271." *USTA II*, 359 F.3d at 589 (emphasis added). And because Congress gave the Commission — and the Commission alone — authority to determine whether a BOC complies with § 271, that authority rests exclusively with the Commission. *See id.* at 565.

Although some CLECs have argued that the reference in § 271(c)(1)(A) to "agreements that have been approved under section 252" provides state commissions with authority to regulate 271 elements, those CLECs have misread this provision. That section expressly refers only to "approv[al]" of agreements under § 252. Congress made no mention of including 271 elements in negotiations under § 251(c)(1) and § 252(a)(1), arbitration under § 252(b), state commission resolution of open issues under § 252(c), or state commission rate-setting under § 252(d)(1). All of those sections, as Verizon has shown, are explicitly linked — and limited — to implementation of § 251(b) and (c). The bare reference to agreements "approved under

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Negotiated Contractual Arrangements Under Section 252(a)(1), 17 FCC Rcd 19337 (2002) ("*Qwest Declaratory Ruling*").

section 252" in § 271(c)(1)(A) is therefore insufficient to vitiate the express terms of § 252, particularly given that Congress "carefully delineate[d] [the] particular role for the state commissions" under the 1996 Act. *USTA II*, 359 F.3d at 568; *see Iowa Utils. Bd.*, 525 U.S. at 385 n.10. If Congress had intended for state commissions to arbitrate terms and conditions implementing § 271 as well as § 251(b) and (c), it would have said so. Instead, "Congress[] grant[ed] . . . sole authority to the Commission to administer . . . section 271," and it "would be inconsistent" with that grant "to interpret the 1996 Act as allowing any other entity the authority to" implement § 271. *InterLATA Boundary Order* ¶ 17; *see id.* ¶ 18 ("the 1996 Act's silence regarding state jurisdiction, rather than implicitly allocating jurisdiction to the states, assures that Commission jurisdiction is not superseded").[135]

2. Congress, in the 1996 Act, "created a comprehensive federal scheme of telecommunications regulation administered by the Federal Communications Commission,"

[135] Relying on *Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co.*, 350 F.3d 482 (5th Cir. 2003), some CLECs have also claimed that state commissions can regulate 271 elements when resolving open issues in interconnection agreement arbitrations. But, to the extent *Coserv* holds that state commissions have authority under federal law to arbitrate any "issues that were the subject of the voluntary negotiations," *id.* at 487, that decision is wrong and in conflict with an Eleventh Circuit decision. *See MCI Telecomms. Corp. v. BellSouth Telecomms. Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002) (per curiam) ("§ 252(b)(1)'s language 'any open issues' can only be read to include those issues which an incumbent is mandated to negotiate"). Indeed, the Fifth Circuit's conclusion that "Congress contemplated" that any "non-§ 251 issues might be subject to compulsory arbitration if negotiations fail," *Coserv*, 350 F.3d at 487, rests on the improbable assumption that Congress delegated federal authority to state agencies to decide a potentially unlimited number of issues — including issues Congress did not deem sufficiently important to address in the 1996 Act — without providing any guidance as to the standard state commissions should apply in resolving those non-§ 251 issues. *See* 47 U.S.C. § 252(c)(1) (state commissions must resolve open issues in accordance with "the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251"). In any event, as even the Fifth Circuit recognized, incumbents have no duty to include 271 elements in negotiations to create a § 252 interconnection agreement, *see Coserv*, 350 F.3d at 488, and this argument could provide no basis for a state commission to exercise authority of 271 elements where incumbents adopt the simple expedient of addressing issues related to 271 elements separate from the negotiations under § 252.

Indiana Bell, 359 F.3d at 494, and "unquestionably" took "regulation of local telecommunications competition away from the States" on "matters addressed by the 1996 Act," including in § 271. *Iowa Utils. Bd.*, 525 U.S. at 378 n.6; *see Triennial Review Order* ¶ 663. Exercising its authority to implement § 271, the Commission has ruled that *federal* law — namely, § 201 and § 202 — establishes the standards that BOCs must meet in offering access to 271 elements. *See Triennial Review Order* ¶ 656; *UNE Remand Order* ¶ 470; *USTA II*, 359 F.3d at 588-90. Interpreting that federal law standard, the Commission has held, moreover, that "TELRIC pricing" or other "forward-looking pric[ing]" for 271 elements would be "counterproductive" and is "no[t] necessary to protect the public interest." *Triennial Review Order* ¶ 656; *UNE Remand Order* ¶ 473. Instead, § 201 and § 202 require nothing more than that "the market price should prevail" — "as opposed to a regulated rate." *UNE Remand Order* ¶ 473.

The Commission's determinations preempt any contrary state commission ruling. Under the Supremacy Clause, "[t]he statutorily authorized regulations of [a federal] agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. FCC*, 486 U.S. 57, 64 (1988).[136] The Commission's conclusion that forward-looking pricing does not — and should not — apply to 271 elements constitutes "a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute"

[136] *See also Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 881 (2000) (states may not depart from "deliberately imposed" federal standards); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982) (federal regulation that "consciously has chosen not to mandate" particular action preempts state law that would deprive an industry "of the 'flexibility' given it by [federal law]").

and thus preempts inconsistent state regulation.[137] State law, therefore, can provide no "back door" for the reimposition of forward-looking rates for network elements that the Commission has determined BOCs should not be required to make available as UNEs. There is no plausible basis on which state commissions could justify "inflict[ing] on the economy the sort of costs" associated with UNEs where the absence of an impairment finding makes it indisputable that there is "no reason to think doing so would bring on a significant enhancement of competition." *USTA I*, 290 F.3d at 429.

More generally, state laws purporting to permit state regulation of 271 elements are preempted because they are inconsistent with the Commission's determination (affirmed by the D.C. Circuit) that § 201 and § 202 establish the standard for assessing the rates, terms, and conditions on which BOCs provide access to 271 elements. *See Triennial Review Order* ¶ 656; *UNE Remand Order* ¶ 470; *USTA II*, 359 F.3d at 588-90. As the Commission has explained, this means that, for 271 elements, "the market price should prevail." *UNE Remand Order* ¶ 473. Thus, a BOC satisfies that federal law standard when it offers 271 elements at market rates, terms, and conditions, such as where it has entered into "arms-length agreements" with its competitors. *Triennial Review Order* ¶ 664. Permitting "state law to determine the validity of the various terms and conditions agreed upon" by BOCs and their wholesale customers "will create a labyrinth of rates, terms and conditions" that "violates Congress's intent in passing the Communications Act." *Boomer v. AT&T Corp.*, 309 F.3d 404, 420 (7th Cir. 2002); *see also Triennial Review Order* ¶ 664 (question whether BOC's provision of § 271 element satisfies § 201 and § 202 requires "a fact-specific inquiry"). This potential for "patchwork contracts"

[137] *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947); *United States v. Locke*, 529 U.S. 89, 110 (2000).

resulting from "the application of fifty bodies of law" "conflicts with Section 202's prohibition on providing advantages or preferences to customers based on their 'locality.'" *Boomer*, 309 F.3d at 418-19. Section 201, moreover, "demonstrates Congress's intent that *federal law* determine the reasonableness of the terms and conditions" of 271 elements. *Id.* at 420 (emphasis added).[138]

Indeed, state law regulation of 271 elements would be contrary to the Commission's expressed preference for commercial agreements with respect to 271 elements. *See UNE Remand Order* ¶ 473; *Triennial Review Order* ¶ 664.[139] As an initial matter, the possibility of state commission review and potential modification of voluntary commercial agreements will encourage parties to attempt to use the regulatory process to improve further on the terms of a negotiated deal, thus diminishing the parties' ability to resolve issues with any certainty at the bargaining table. The Commission recognized this in the *Qwest Declaratory Ruling*, explaining that subjecting commercial agreements to the same procedural requirements that Congress specifically applied only to agreements implementing § 251(b) and (c) would raise "unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs." *Qwest Declaratory Ruling* ¶ 8. In addition, most competitors operate in multiple states and typically seek to negotiate multi-state agreements with incumbents. If the rates, terms, and

[138] *See also* Order on Reconsideration, *Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as Amended*, 7 FCC Rcd 4123, ¶¶ 14-18 (1992) (preempting state law based, in part, on its finding that rulings "in numerous jurisdictions around the country almost certainly would produce varying and possibly conflicting determinations," thereby "frustrating [Congress's] objectives of certainty and uniformity").

[139] *See also, e.g.*, Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein on Triennial Review Next Steps (Mar. 31, 2004) ("The Communications Act emphasizes the role of commercial negotiations as a tool in shaping a competitive communications marketplace.").

conditions for provision of 271 elements in such agreements were subject to diverging and potentially conflicting regulation by each state commission, the ability of carriers to reach commercial agreements would also be severely undermined. In this regard, it is noteworthy that numerous competitors in multiple states have obtained access to directory assistance and operator services as 271 elements from Verizon under a standard multi-state contract offer, without any regulation by state commissions. As the Commission recognized, there has been "no adverse effect" on competitors — let alone any "perverse policy impact" — from BOCs provision of these 271 elements without state regulation. *Triennial Review Order* ¶ 661.

V. WHERE THE COMMISSION DOES NOT FIND IMPAIRMENT FOR PARTICULAR NETWORK ELEMENTS, IT SHOULD ADOPT RULES THAT PROVIDE FOR A PROMPT MOVE TO A LAWFUL REGIME AND THAT CONFIRM THAT COMMERCIAL AGREEMENTS FOR THE PROVISION OF SUCH NETWORK ELEMENTS ARE NOT GOVERNED BY § 252

A. The Commission Must Exercise Its Authority To Correct the Effects of Its Prior Unlawful UNE Rules

1. In any instance where the Commission does not find that competitors would be impaired in a geographic market or market segment without UNE access to a particular network element, the Commission must adopt rules that promptly move the market from the prior, unlawful regime of maximum unbundling to a lawful regime. Any such rules must consist of two parts.

First, the Commission must immediately prevent CLECs from adding new UNE customers. As explained above, a finding of impairment is necessary before the Commission can order incumbents to provide access to a network element as a UNE. *See supra* pp. __-__. Where the Commission has not found impairment, therefore, the Commission has no legal authority to require incumbents to provide new UNE arrangements. Nor could such a

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requirement be justified as an interim, or transition, rule. Unless CLECs are impaired in a particular market, allowing them to add new UNE arrangements is not a "transitional" step *toward* the result mandated by the 1996 Act. On the contrary, it is a step *away* from a lawful regime. In any event, because CLECs have continued to obtain new UNE arrangements in the seven months since the D.C. Circuit vacated the Commission's UNE rules (yet again), there can be no serious argument that CLECs need additional time to compete using UNEs where the Commission does not find that CLECs would be impaired without UNEs.

Second, for the embedded base of UNE arrangements — which were obtained as a result of the Commission's thrice-vacated rules — the Commission must provide for prompt increases to lawful rates or to negotiated rates as part of commercial agreements, such as those Verizon and the other BOCs have entered into since the *Triennial Review Order*.[140] Just as the Commission has no authority to require incumbents to provide *new* UNE arrangements in the absence of a finding of impairment, so too is it prevented from requiring incumbents to continue to provide existing UNE arrangements without a lawful finding of impairment. Thus, the Commission should ensure that prices for mass-market switching are increased to the comparable resale rates and that prices for high-capacity UNEs move promptly to their

[140] *See* Opposition of BellSouth, Qwest, SBC, USTA, and Verizon to Emergency Motion for Stabilization Order at 9 & n.23, CC Docket Nos. 01-338, *et al.* (FCC filed July 6, 2004); *see also*, *e.g.*, Verizon News Release, *Verizon and Covad Reach Interim Wholesale Agreement* (Sept. 21, 2004), *available at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=87015; Verizon News Release, *DSCI, Verizon Reach Wholesale Telecom Services Accords* (Sept. 15, 2004), *available at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=86916; Verizon News Release, *Verizon and Granite Sign Commercial Agreement for Wholesale Services* (Aug. 25, 2004), *available at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=86658; Verizon News Release, *InfoHighway and Verizon Sign Letter of Intent for Wholesale Enterprise (DS1) Services* (May 18, 2004), *available at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=85135; Verizon News Release, *Verizon Entering Into Commercial Agreement with a Wholesale Customer* (June 18, 2004), *available at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=85593.

corresponding special access rates (including any volume or term plan to which carriers choose to subscribe), or to whatever alternative commercially negotiated rates to which the parties' may agree. If the Commission has concerns about moving from UNE rates to lawful rates in a single step, the Commission could provide for the increase to occur in, for example, three increments.

It is essential, however, that the initial increment apply immediately, to provide the incentive both to begin and to complete promptly negotiations for alternative commercial arrangements. A lengthy transition period will simply encourage CLECs to delay commercial negotiations for as long as they can obtain access to ILEC facilities at below-market rates. As long as CLECs using UNEs can underprice efficient competitors that are competing *without* UNEs, the Commission's prior, unlawful unbundling rules will continue to undermine facilities-based competition and harm consumers.

Nor is there any reason to provide CLECs with a lengthy transition period. CLECs have already had access to mass-market switching and high-capacity facilities as UNEs for both new and existing customers for seven months from the date the D.C. Circuit issued its decision in *USTA II* — not to mention for more than eight years under rules that have consistently been held unlawful. And, because the Commission's UNE rules have been under constant (and repeatedly successful) legal challenge since they were first issued, CLECs can make no claim of reasonable reliance on those rules. *See Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1110 (D.C. Cir. 2001) (holding that, where the agency's rules "had never been judicially confirmed, but were under unceasing challenge before progressively higher legal authorities," "reliance is typically not reasonable"). These CLECs have known — or should have known — that their reprieve from *USTA II* was, at best, temporary, and should have been pursuing alternative, lawful means of serving their customers.

2. In establishing rules to move the market to a lawful regime, the Commission can — indeed, must — rely upon its clearly established power to correct the consequences of its vacated rules. *See United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073 (D.C. Cir. 1992) (reading *Callery* to embody the "general principle of agency authority to implement judicial reversals"). Thus, where the Commission does not make a finding of impairment and therefore cannot reinstate a vacated UNE rule, the Commission should make clear that change-of-law (or other) provisions in an interconnection agreement cannot be used to impede or negate the Commission's determinations that incumbents are not required to provide certain elements as UNEs under § 251(c)(3).[141] To the extent that interconnection agreements obligated incumbents to provide access to these elements as UNEs, that is only because such agreements are a "creation of federal law" and are the "tools through which the 1996 Act is implemented and enforced." *Verizon Maryland, Inc. v. Global NAPs, Inc.*, 377 F.3d 355, 364 (4th Cir. 2004) (internal quotation marks and alterations omitted).[142] The UNE provisions do not reflect voluntary, commercial agreements, but instead "represent nothing more than an attempt to comply with the requirements of the 1996 Act" as set forth in the Commission's (subsequently vacated)

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[141] *See, e.g.*, Ex Parte Letter from Dee May, Vice President — Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, *et al.* (July 28, 2004); Ex Parte Letter from Dee May, Vice President — Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, *et al.* (Aug. 20, 2004).

[142] *See also MCI WorldCom Communications, Inc. v. Department of Telecomms. & Energy*, 442 Mass. 103, 810 N.E.2d 802, 810 (2004) (explaining that an interconnection agreement is "not only closely associated with the Federal regulatory scheme, . . . its very existence is mandated by that scheme").

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regulations. *AT&T Communications of the Southern States, Inc. v. BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000).

This is especially true in the case of any agreements, such as the majority of Verizon's, that expressly provide that nothing more than formal notice is required in the event that any unbundling requirements are removed, including as a result of any judicial or regulatory decision. For example, more than 1,000 of Verizon's agreements with CLECs provide that, "[n]otwithstanding anything in this Agreement to the contrary, if, as a result of any . . . judicial [or] regulatory . . . decision, . . . Verizon is not required by Applicable Law to provide any Service [defined to include UNEs] . . . to [the CLEC] . . . , then Verizon may discontinue the provision of any such Service . . . . [on] thirty (30) days prior written notice."[143] Such provisions were arrived at in a bargaining process largely favoring the *competitive* carriers. Where competitors agreed that nothing more than a certain number of days notice would be necessary before Verizon could cease providing a UNE, they must be held to the terms of their bargain.

But matters are no different in the case of agreements that are ambiguous on this score, or that contain a generic change-of-law provision. In either case, forcing incumbents to go through a "change of law" renegotiation process before they could cease providing UNEs for which the Commission has not found impairment would merely be a way of perpetuating the Commission's prior unlawful unbundling requirements indirectly. But such an order is no different in effect, if not also in purpose, from imposing UNE requirements directly. Because the

[143] Ex Parte Letter from Dee May, Vice President — Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, Attach. at 2, CC Docket Nos. 01-338, *et al.* (Aug. 20, 2004). As *USTA II* makes clear, and as explained above, in the context of the requirement to provide access to UNEs, the only "Law" that is "Applicable" are the Commission's regulations implementing § 251(c)(3) and § 251(d)(2). Without a finding of impairment by the Commission, no unbundling requirements can be imposed on incumbents consistent with the 1996 Act.

Commission cannot do so directly, without first finding impairment on the basis of substantial record evidence, it cannot do so indirectly either, by preserving the legal effect of provisions that were included in interconnection agreements based on unlawful rules. Moreover, where, as here, a court vacates an agency's rule, it is not changing the law, but is finding that the agency's rule did comply with the law, as enacted by Congress. *See, e.g., AT&T v. FCC*, 978 F.2d 727, 736-37 (D.C. Cir. 1992). Therefore, when the Commission, conducting an impairment analysis pursuant to *USTA II* and other binding guidance from the Supreme Court and the D.C. Circuit, does not find impairment, it has not changed the law; it has merely followed federal law, as it has always existed. *See, e.g., Dixon v. United States*, 381 U.S. 68, 74-75 (1965). And any such decision does not qualify as a change of law for purposes of any "change of law" provisions in interconnection agreements.

Moreover, there is no question that the Commission can (and, under the circumstances here, must) provide for uniform implementation, regardless of the provisions of individual agreements. The D.C. Circuit has held that, "where intervening circumstances — in th[at] instance, FERC-mandated open access transmission — affect an entire class of contracts in an identical manner, we find nothing . . . prohibit[ing] FERC from responding with a public interest finding applicable to all contracts of that class." *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 710 (D.C. Cir. 2000). Likewise, this Commission's determination that UNE requirements cannot be reimposed for elements as to which the courts have vacated prior UNE rules would affect "an entire class of contracts in an identical manner," because the UNE provisions in interconnection agreements, as a class, are a direct result of the Commission's vacated UNE rules. The public interest, therefore, demands that the Commission provide for uniform implementation of determinations that § 251(c)(3) does not require unbundling of particular elements regardless of the provisions of particular interconnection agreements.[144]

In addition, in the exceptional circumstances presented here, where eight years of interconnection agreements have been based on UNE rules that have been vacated three consecutive times, the *Mobile-Sierra* doctrine[145] authorizes the Commission to negate contrary terms of interconnection agreements, based on a finding that it would not be in the public interest to require continued access to UNEs under contract provisions that were drafted to comply with vacated regulations. Indeed, "it is well-established that the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and to modify other provisions of private contracts when necessary to serve the public interest." *Cable & Wireless*, 166 F.3d at 1231-32 (internal quotation marks omitted). And such a finding plainly would be warranted here, where the absence of a finding of impairment entails that the provision of UNEs at TELRIC rates is contrary to the public interest.[146] The Commission applied *Mobile-Sierra* to require a fresh look at contracts between ILECs and CMRS providers executed prior to the 1996 Act, in light of the reciprocal compensation provision of § 251(b)(5) of the 1996 Act.[147] The

[144] The Commission is entitled to "'substantial deference' to its judgments regarding the public interest." *Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1232 (D.C. Cir. 1999) (quoting *Mobile Communications Corp. of Am. v. FCC*, 77 F.3d 1399, 1406 (D.C. Cir. 1996)).

[145] *See FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956).

[146] The Commission's statement in a footnote in its Memorandum Opinion and Order, *IDB Mobile Communications, Inc. v. COMSAT Corp.*, 16 FCC Rcd 11474 (2001), that "*Sierra-Mobile* analysis does not apply to interconnection agreements reached pursuant to sections 251 and 252 of the Act, because the Act itself provides the standard of review of such agreements," *id.* ¶ 16 n.50, not only is pure dicta — the case involved a satellite contract — but also does not address the circumstance where an agreement reflects prior, vacated rules.

[147] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1095 (1996) ("*Local Competition*

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Commission should do the same in the circumstances presented here, particularly in light of the fact that, normally, "there is no duty to aid competitors" because of the "uncertain virtue of forced sharing." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 124 S. Ct. 872, 879, 881 (2004). The 1996 Act creates a narrow exception to that general rule — the extraordinary obligation to offer network elements "not to consumers but to rivals, and at considerable expense and effort," *id.* at 880 — which applies only in the specific circumstances defined by Congress in § 251(d)(2) and which would be "counterproductive" to impose outside of those circumstances, *UNE Remand Order* ¶ 473.

In any event, this is a bridge that the Commission has already crossed. In the *Interim Order*, the Commission contravened the terms of the vast majority of Verizon's interconnection agreements, which contain provisions — in almost all cases, voluntarily agreed to by the CLECs — that permit Verizon to cease providing access to UNEs with only formal notice after the Commission or a court has eliminated a rule that had required Verizon to provide the UNE. As the Commission recognized, discontinuing provision of these UNEs pursuant to such agreed-upon terms in interconnection agreements is "*permitted* under the court's holding in *USTA II*." *Interim Order* ¶ 17 (emphasis added).[148] Nonetheless, the *Interim Order* overrode all of those

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Order") ("Courts have held that 'the Commission has the power . . . to modify . . . provisions of private contracts when necessary to serve the public interest.' ") (quoting *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987)), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part*, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *decision on remand*, *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part sub nom. Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

[148] Verizon, however, did not "announce[] its intention to withdraw" mass-market switching or high-capacity facilities as UNEs "immediately." *Interim Order* ¶ 17 & n.49. Instead, Verizon informed state commissions that, under the plain language of many of its voluntarily negotiated, state commission-approved interconnection agreements, CLECs had agreed that Verizon could discontinue providing a UNE when federal law no longer required

provisions and prevented the "withdrawal of access to UNEs," and did so based solely on the *possibility* that "the Commission ultimately might find [them] to be subject to section 251(c)(3)." *Id.* ¶ 26. Having altered the terms of interconnection agreements to preserve access to UNEs based on a mere possibility, the Commission must take similar action to enable incumbents to eliminate access to UNEs after the Commission finds that these elements, in fact, are *not* subject to unbundling under the standards of § 251(c)(3) and § 251(d)(2). Indeed, it would be arbitrary and capricious for the Commission to refuse to do so, and to relegate incumbents to the very litigation before state commissions and in federal courts that the Commission found "would be wasteful" when there was only a possibility of a future finding of impairment. *Id.* ¶ 17.

3. Finally, the Commission must make clear that state commissions cannot forestall the implementation of the Commission's determination that a particular element need not be unbunded. Past experience shows that CLECs will raise — and many state commissions will prove receptive to — every conceivable argument in an effort to prolong Verizon's obligation to provide UNEs at TELRIC rates notwithstanding this Commission's findings. Indeed, these same CLECs have argued to the Commission that its no impairment findings — or the D.C. Circuit's

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Verizon to provide it; in each case, however, Verizon's statements were qualified by reference to the commitment Verizon made to the Commission. *See* Ex Parte Letter from Ann D. Berkowitz, Verizon, to Marlene H. Dortch, FCC, Attach. at 1, WC Docket No. 01-338 (July 1, 2004). The ILECs did point out that there were "orderly procedures" in place that would avoid disruption of service. *Interim Order* ¶ 17 n.49. But, in doing so, they also explained that this included, even where interconnection agreements require only notice, voluntary undertakings to continue to provide various elements for specified periods of time, commitments to provide a specified period of advance notice of impending changes, and/or commitments to provide CLECs with analogous services at a wholesale discount rather than terminate service. *See, e.g.*, ILEC Opposition to Motions for Stay Pending the Filing of Certiorari Petitions at 15 & Exh. E (Ruesterholz Decl.) at 3-5 (D.C. Cir. filed June 1, 2004) ("ILEC Stay Opp."). And, while the ILECs also pointed out that the CLECs themselves had asserted that change-of-law processes would adequately *"protect competitors,"* ILEC Stay Opp. at 15, they nowhere suggested that, even where required, those processes, by themselves, would or could grant the ILECs substantive relief.

vacatur of its impairment findings — are irrelevant because § 271 or merger conditions applicable to Verizon supposedly require the continued provision of UNEs at TELRIC rates.[149]

The Commission has ample authority to require CLECs to act promptly where the absence of an impairment finding precludes the reimposition of a vacated UNE rule. When the Commission established national, default collocation intervals, it required ILECs to file tariff and SGAT amendments within 30 days (with the tariff amendments to take effect at the earliest time permissible under state law, and the SGAT amendments to take effect 60 days after filing). It also required prompt good-faith renegotiation of agreements to reflect those intervals.[150] In the context of the imposition of new UNE obligations, the Commission has required incumbents to complete all work necessary to provide a new UNE in as little as six months, with interim measures taken before that time. *See Line Sharing Order* ¶¶ 161-170. In contrast, it plainly does

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[149] *See, e.g.*, Petition for Declaratory Ruling, CC Docket Nos. 98-141 & 98-184 (FCC filed Sept. 9, 2004); Comments of AT&T at 11, WC Docket No. 04-245 (FCC filed July 30, 2004). As explained above, the Commission has already determined that 271 elements are not UNEs and that imposing forward-looking rates for such elements is contrary to the public interest. *See supra* pp. 120-21, 124-25. As Verizon explains in comments filed today in response to the Petition for Declaratory Ruling in CC Dockets No. 98-141 & 98-184, Verizon's obligation, under the *BA/GTE Merger Conditions*, *see* Memorandum Opinion and Order, *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control*, 15 FCC Rcd 14032 (2000), to provide UNEs in accordance with the terms of the *UNE Remand Order* and *Line Sharing Order* expired on March 24, 2003, the date when the Supreme Court denied the petition for certiorari that CLECs filed challenging the vacatur of those two orders. Even aside from that fact, this obligation would have expired of its own force in July 2003, pursuant to the general sunset provision in the merger conditions. *See* Comments of Verizon on Petition for Declaratory Ruling, CC Docket Nos. 98-141 & 98-184 (FCC filed Oct. 4, 2004);; *see also* Reply of Verizon to AT&T Comments, CC Docket No. 98-184 (FCC filed Aug. 10, 2004).

[150] *See* Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 17806, ¶¶ 34-36 (2000).

not require any extended period of time to implement the Commission's ruling that incumbents do *not* have to provide certain elements as UNEs.

B. Commercial Agreements That Do Not Relate to Unbundling Obligations Under § 251(c) Are Not Subject to the Requirements of § 252

Even with respect to network elements that no longer must be provided as UNEs, incumbents have every incentive to negotiate reasonable commercial terms for the provision of such network elements, to avoid losing wholesale customers to alternative sources of supply. Verizon has consistently reiterated its willingness to enter into such commercial arrangements and, moreover, has publicly announced a framework for such agreements that would provide effective discounts through such agreements that are greater than those required by the 1996 Act. *See* Verizon News Release, *Verizon Announces New Framework for Commercial Agreements with Wholesale Customers* (Apr. 21, 2004), *available at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=84716; *see also* Kahn/Tardiff Decl. ¶ 10 (explaining that "firms in the [deregulated] transportation industries, in contrast with the contentious experiences in telecommunications under egulations, have long been able to negotiate interconnection and other such mutually beneficial wholesale arrangements among themselves"). As noted above, following the *Triennial Review Order* and *USTA II*, Verizon and each of the BOCs has reached commercial agreements with competitors to provide access to elements that no longer must be unbundled under § 251 without the intervention of state commissions.

The Commission has already determined that such agreements are not subject to the filing requirements in § 252(a), arbitration under § 252(b), state commission review and approval under § 252(e), or the opt-in requirement in § 252(i), and should reaffirm that determination

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here. *See Qwest Declaratory Ruling* ¶ 8.[151] In the *Qwest Declaratory Ruling*, the Commission addressed Qwest's argument that § 252 does not apply to agreements pertaining to "network elements that have been removed from the national list of elements subject to mandatory unbundling." *Id.* ¶ 3. The Commission endorsed that understanding, specifically rejecting the argument that *all* access agreements between ILECs and CLECs are subject to § 252. *See id.* ¶ 8 n.26. Instead, the Commission explained, § 252 applies to "only those agreements that contain an ongoing obligation relating to section 251(b) or (c)." *Id.* As a result, *only* "an agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation" — *i.e.*, an agreement pertaining to the specific statutory obligations set forth in § 251(b) and (c) — "is an interconnection agreement that must be filed pursuant to section 252(a)(1)." *Id.* ¶ 8. An agreement that does *not* create an ongoing obligation pertaining to those duties — for example, an agreement for wholesale services that replace a network element or a combination of elements that is *not* required to be unbundled under § 251(c)(3) — is *not* subject to § 252. Any other result, the Commission stressed, would create "unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs." *Id.*

That dispositive holding is compelled, moreover, by the text and structure of the 1996 Act. The statutory provision that determines the applicability of § 252 requirements is § 252(a)(1), which is triggered by "a request for interconnection, services, or network elements *pursuant to section 251*." 47 U.S.C. § 252(a)(1) (emphasis added). The core question, then, is whether commercial negotiations over wholesale services to replace elements or combinations of

[151] *See, e.g.*, Comments of the Verizon Telephone Companies, WC Docket 04-172 (FCC filed May 13, 2004).

elements that need *not* be unbundled under § 251(c)(3) are nevertheless negotiations in response to a request made "pursuant to section 251." They plainly are not. On the contrary, such negotiations are undertaken pursuant to the parties' joint interest in establishing a workable, commercial arrangement *outside the scope of § 251*. Indeed, it would rob § 252(a)(1)'s "pursuant to" clause of all meaning to suggest that *any* negotiations regarding access to ILEC networks on a wholesale basis automatically trigger § 252, regardless of whether those negotiations are intended to delineate the precise terms of access to elements or services that must be provided under § 251(b) or (c).

The result the Commission reached in the *Qwest Declaratory Ruling* is also sound policy. Application of § 252 to negotiations over wholesale arrangements that are not required under § 251(c) would interject regulatory uncertainty into the ongoing process of business-to-business discussions and would frustrate commercial negotiations. If issues that cannot be resolved in voluntary, commercial negotiations will be submitted to state commissions for resolution, parties will be less likely to negotiate in the first place, as they recognize that the ultimate decision whether to accept particular terms will be largely out of their hands. Similarly, if state commissions can review and potentially modify voluntary commercial agreements, parties will inevitably attempt to use the regulatory process to improve further on the terms of a negotiated deal, thus diminishing the parties' ability to lock one another in at the bargaining table. Interjecting state commissions into negotiations in these ways would thus sharply circumscribe the parties' ability to retain control over the terms of their agreements, and accordingly promises to chill the very negotiations the Commission has sought to encourage.

Finally, some CLECs have argued that, to comply with § 271, a BOC must provide 271 elements pursuant to state commission-approved interconnection agreements. But, as explained above, the Commission has already held that an agreement that does not "contain an ongoing obligation relating to section 251(b) or (c)" — such as an agreement limited to 271 elements — is *not* "an interconnection agreement that must be filed pursuant to section 252(a)(1)" and is *not* subject to "state commission . . . approv[al] or reject[ion] [of] the agreement as an interconnection agreement under section 252(e)." *Qwest Declaratory Ruling* ¶¶ 8, 12 & n.26. The Commission also has not interpreted § 271 to require a BOC to provide checklist items through a state commission-approved interconnection agreement. Instead, the Commission has found that a BOC satisfies the competitive checklist as long as it has a "concrete and specific legal obligation" to provide a checklist item, such as through a tariff. *Connecticut 271 Order*[152] ¶ 39; *see, e.g., Pennsylvania 271 Order* ¶ 96; *Massachusetts 271 Order*[153] ¶ 194; *New York 271 Order* ¶ 73. A commercial agreement with a competitor unquestionably satisfies that standard.[154]

VI. THE COMMISSION SHOULD CLARIFY ITS UNBUNDLING RULES SO AS TO REMOVE DISINCENTIVES TO THE DEPLOYMENT OF BROADBAND FACILITIES

The Commission has incorporated into the present docket, among other things, "the record generated by the petitions for reconsideration and clarification of the *Triennial Review Order*, including discussion of issues such as broadband unbundling requirements." *NPRM* ¶ 12.

[152] Memorandum Opinion and Order, *Application of Verizon New York Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, 16 FCC Rcd 14147 (2001) ("*Connecticut 271 Order*").

[153] Memorandum Opinion and Order, *Application of Verizon New England Inc., et al., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988 (2001) ("*Massachusetts 271 Order*"), *aff'd in part, dismissed in part, and remanded in part, WorldCom, Inc. v. FCC*, 308 F.3d 1 (D.C. Cir. 2002).

[154] Such an agreement, moreover, if filed with the Commission, would be filed pursuant to § 211(a), which provides for "fil[ing] with the Commission copies of all contracts . . . with other carriers" but not for prior Commission approval of such contracts.

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Verizon has addressed these issues at length elsewhere but will briefly recapitulate its position here for the Commission's convenience.[155]

One of the main objectives of the *Triennial Review Order* was to free the ILECs from any unbundling requirement that would dampen "incentive[s] to deploy fiber (and associated next-generation network equipment, such as packet switches and [digital line carrier ("DLC")] systems) and develop new broadband offerings." *Triennial Review Order* ¶ 290. With respect to the provision of broadband to mass-market customers, the Commission found that cable operators, not local telephone companies, are the incumbent providers, with cable modem service the "most widely used means by which the mass market obtains broadband service." *Id.* ¶ 262. The *Triennial Review Order* also makes clear that there is no legal basis for imposing unbundling requirements on broadband facilities, because "competitive LECs have demonstrated that they can self-deploy" such facilities and are in fact "currently leading the overall deployment." *Id.* ¶¶ 275, 279; *see id.* ¶¶ 538-539.

Consistent with these findings, the *Triennial Review Order* "eliminate[d] most unbundling requirements for broadband, making it easier for companies to invest in new equipment and deploy the high-speed services that consumers desire." *Id.* ¶ 4. By giving ILECs the "*certainty* that their fiber optic and packet-based networks will remain free of unbundling requirements," the Commission sought to give ILECs "the opportunity to expand their deployment of these networks, enter new lines of business, and reap the rewards of delivering broadband services to the mass market." *Id.* ¶ 272 (emphasis added). This, in turn, would cause competitive LECs "to seek innovative network access options to serve end users and to fully

[155] *See, e.g.*, Response of Verizon to Petitions for Reconsideration, CC Docket Nos. 01-338, *et al.* (FCC filed Nov. 6, 2003); Consolidated Reply of Verizon to Oppositions to Petitions for Reconsideration, CC Docket Nos. 01-338, *et al.* (FCC filed Nov. 17, 2003).

compete against incumbent LECs in the mass market." *Id.* As the Commission noted, applying unbundling obligations "to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, *in direct opposition to the express statutory goals authorized in section 706.*" *Id.* ¶ 288 (emphasis added).

Unfortunately, the rules issued by the Commission do not provide, in certain respects, the desired *certainty* that next-generation broadband networks will remain free from unbundling obligations. The Commission currently is addressing some of these issues in other, separate proceedings, and Verizon will not dwell on them here. Of greatest significance in this regard is the Commission's consideration of Verizon's pending petition for forbearance from any unbundling obligation for broadband network elements that § 271 may be construed to impose. Making it clear that Verizon and other BOCs need not unbundle their broadband networks under § 271, just as the Commission already determined they need not be unbundled under § 251, is the single most important step the Commission can take to promote widespread broadband deployment. Accordingly, the Commission should grant Verizon's pending petition promptly.[156]

Two other issues that remain pending before the Commission and are not currently being addressed separately are discussed below.

[156] *See* Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), CC Docket No. 01-338 (FCC filed July 29, 2002); Ex Parte Letter from Susanne Guyer, Verizon, to Michael Powell, Kathleen Abernathy, Kevin Martin, Michael Copps, and Jonathan Adelstein, Commissioners, FCC, CC Docket No. 01-338 (Oct. 24, 2003) (withdrawing the request for forbearance with respect to *narrowband* elements); *Verizon Tel. Cos. v. FCC*, 374 F.3d 1229, 1235 (D.C. Cir. 2004) (requiring the Commission to "grant Verizon's petition for forbearance or to provide a reasoned explanation for denying it").

A. The Commission Should Eliminate the Distinction Between Mass-Market and Enterprise-Market Customers with Regard to Broadband Unbundling Obligations — And, if It Fails To Do That, Then It Must Clarify the Distinction Between the Two for Purposes of Its Rules Governing the Unbundling of Broadband Network Elements

The Commission in its *Triennial Review Order* found that competitors were not impaired without access to mass-market fiber loops and that refraining from unbundling these loops would spur deployment by competitors and incumbent LECs alike. In the enterprise market, however, the Commission's rules appear to retain an unbundling obligation with respect to dark fiber. There is no reason to treat the enterprise market differently from the mass market insofar as unbundling obligations for next-generation broadband networks are concerned because competitors in the enterprise market are not impaired without access to these elements, no matter how that market is ultimately defined. If any difference in the respective unbundling regimes for mass-market and enterprise customers persists, however, then the Commission will need to clarify the dividing line between those markets.

1. The Commission Should Eliminate the Distinction Between Mass Market and Enterprise Market for Purposes of Its Broadband Unbundling Rules

As discussed above in Part II (on High-Capacity UNEs), competing carriers have been able to serve enterprise customers either over alternative, non-ILEC high-capacity loops or via special access.[157] Moreover, in the many places where competing carriers have deployed their own fiber loops and transport facilities, they make dark fiber available to other carriers on a wholesale basis. *See 2004 Fact Report* at III-18, Table 11. With enterprise-market competition flourishing at the retail and wholesale levels in this way, the Commission cannot logically or lawfully make a finding of impairment with respect to dark fiber in the enterprise market. The

[157] *See generally supra* Parts II.C.2 (on alternative loops), II.C.3 (on special access), and II.D.1.a (describing the intense competition for enterprise customers).